

6000
United States of America

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Washington, D.C.

CROFT METALS, INC.

Employer

and

INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIP BUILDERS,
BLACKSMITHS, FORGERS AND HELPERS,
AFL-CIO

Petitioner

Case No. 15-RC-839 93

**PETITIONER'S BRIEF BEFORE THE NATIONAL
LABOR RELATIONS BOARD IN OPPOSITION
TO THE EMPLOYER'S REQUEST FOR REVIEW**

Comes now the Petitioner, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (hereinafter Boilermakers) and submits the following Brief in opposition to the Employer's Request for Review of the Regional Directors' Decision and Direction of Election.

The Board granted Petitioner's Request for Review solely on the issue of whether or not certain individuals constitute supervisors within the meaning of the Act. The Regional Director rejected Respondent's argument that leadpersons are supervisors within the meaning of the Act and included them in the bargaining unit.

The Employer employs approximately 20-25 acknowledged supervisors who have responsibility over the bargaining unit directly. (Tr. p. 14, ls. 15-20).¹ The Employer's own witnesses were unclear on how many leadpersons there were, but the Regional Director found there were 25-30 leadpersons who report directly to one of the acknowledged supervisors. The Regional Director also found there are approximately 350 employees in the unit Petitioner seeks to represent.

Section 2(11), 29 U.S.C. § 152 (11) of the Act defines "supervisor" as:

" ... any individual having authority, in the interest of the employer to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them or to adjust their grievance or to effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The indicia outlined in the statute are to be read in the disjunctive, so that only one factor needs to be present in order to confer supervisory status. *Pro-Tech Security Network*, 308 NLRB 655, 659 (1992). However, in order for supervisory status to exist, the exercise of one or more of the indicia listed in the statute must be accomplished with independent judgment, and not in a routine or clerical manner. *KGW-TV*, 329 NLRB No., 39, *sl. op.* at 4 (1999); *Hydro Conduit*, 254 NLRB 433, 437 (1981). Supervisory status is not determined by title or job classification, but by the nature of the individual's functions and authority in the workplace. *Pro-Tech Security Network*, 308 NLRB 655, 659 (1992).

¹Contrary to the assertion in the Employer's brief, the Regional Director did not find there were 20-25 acknowledged supervisors "over the production and maintenance employees". Rather, the Regional Director found there were 20-25 admitted supervisors over the employees "in the unit the Petitioner seeks to represent."

The requirement that a supervisor be one who utilizes independent judgment when exercising one of the indicia outlined in the statute is a significant qualification, designed to limit the number of employees likely to be found to be supervisors. As the Board has noted that, in crafting the definition of “supervisor”, Congress stressed that only persons with “genuine management prerogatives” should be considered as having supervisory authority, as opposed to “straw bosses, leadpersons . . . and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985)(citing *S. Rep. No. 105, 80th Cong.*, 1 Sess. 4 (1947)), *enf. in relevant part*, 794 F.2d 527 (9th Cir. 1986). Accordingly, the Board has an affirmative duty not to construe supervisory status too broadly because an employee found to be a supervisor is denied rights guaranteed under the Act. *Quadrex Environmental Company, Inc.*, 308 NLRB 101, 102 (1992). *See, also, Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996)(In construing the Act, the Board must “take care to assure that exemptions from coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach.”

The party asserting supervisory status bears the burden of proof on that issue. *NLRB v. Kentucky River Community Care Center*, 532 U.S. 706 (2001). A mere inference or conclusory statements without detailed, specific evidence of independent judgment, are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991); *Quadrex Environmental*, 308 NLRB 101, 102 (1992). Lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB No. 150, *sl. op.* at 1. Where the evidence is in conflict or otherwise inconclusive on a particular indica of

supervisory status, the Board will not find supervisory status on the basis of that particular indicia. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

The Employer admittedly had a collective bargaining relationship with the Carpenters prior to their employees being organized by the Boilermakers. (Pet. Ex. 1, Tr. 67-68). Under that collective bargaining agreement leadpersons were in the bargaining unit. (Tr. 69). In fact, the former local union president is and was a leadperson at the time he served as local union president. (Tr. 99-102). All of the leadpersons that testified were part of the bargaining unit previously. (Tr. 138-40, 171, 217 and 241). Former union President Charles Coleman even handled grievances on behalf of the union while acting as leadperson. (Tr. 156-57). Clearly, this bargaining history weighs heavily in favor of finding the leadpersons not to be statutory supervisors.

It should also be noted that most of the Respondent's evidence is anecdotal in nature. Respondent offers little evidence of any weight to find the leadperson classification as a whole constitutes a supervisor. At best, Respondent has come forward with some evidence on individual leadpersons which arguably supports the position that they are supervisors. However, Respondent made little or no effort to prove that leadpersons as a group are supervisors within the meaning of the Act.

It should also be noted that the two primary witnesses the Employer supplied to testify in connection with the responsibilities of leadpersons have little direct knowledge as to what work leadpersons actually perform. Vic Donati, Vice-President of Human Resources, testified when the trial originally began. Donati admitted that he is in his office most of the time and is

not in the plant very often. (Tr. 11 and 73). The Employer's other principal witness was Tim Leonard, who has been the plant Personnel Director for the 3-1/2 months preceding the second hearing, which is a period of time after the Petition was filed and after the first hearing. (Tr. 269 and 318). Neither one of these individuals' testimony should be afforded a great deal of weight given their lack of knowledge concerning the jobs performed by leadpersons.

I. The A And B Leadpersons Are Not Supervisors Within The Meaning Of The Act.

Lead A and B people actually work on the line. (Tr. 26). Of the leadpersons who testified: one testified that 90-98% of his time was spent on the line, one testified that he works all the time, one testified that he works most of the day on the line, and one testified that most all of the work is done on line. (Tr. 106, 145, 180, 207-208, and 232-33). Those same lead people testified that it is normal for leadpersons to be performing production work. (Tr. 101-105 and 108). It is part of the leadpersons' job to identify problems on their production line and to physically correct those problems. (Tr. 33-34).

The Employer's argument relies heavily on the responsibilities for the leadperson set forth in the bid posting.² However, as discussed before, individual supervisor status is not determined by their title or job classification, but by the functions and authority they actually have in the workplace. Since the burden rests on the Employer to prove the individual is a supervisor, any lack of evidence or mere inference or conclusory statements to support the Employer's position will not be sufficient to establish the supervisor status of leadpersons.

²It is interesting to note that this is also evidence that distinguishes the leadpersons from supervisors. All leadpersons bid into their job. (Tr. 28 and 242). Supervisors, however, are not selected through the bid procedure. (Tr. 70).

The Employer argues that Tim Leonard testified that leadpersons had effectively recommended employees for hire and provided several examples. What Leonard testified to was three examples of where leadpersons had recommended individuals for hire. Leonard also admits that anyone can make such a recommendation and that they have in fact hired based on non-leadperson recommendations. (Tr. 320-21 and 346). Vice-President Donati testified that he could think of no examples where such a recommendation has been made. (Tr. 32). The leadpersons who testified on this issue testified that they do not evaluate and recommend action regarding employees. (Tr. 109-10, 112, 135, 143, 147, 192, and 202). Occasional isolated incidents which might otherwise be indicative of supervisory authority are generally insufficient to predicate a supervisory finding. *Commercial Fleet Washington*, 190 NLRB 326 (1971); *Highland Telephone Cooperative*, 192 NLRB 1057 (1971); *Billows Electric Supply*, 311 NLRB 878 (1993); *Brown & Root, Inc.* 314 NLRB 19 (1994).

The Employer argues that leadpersons are responsible for the direction of employees under the leadperson. However, all the leadpersons who testified, testified that this direction of employees was routine in nature. (Tr. 106, 142, 204 and 224). The Board has held that in numerous context that merely assigning tasks to employees does not make an employee a supervisor. *Plastic Industrial Products*, 139 NLRB 1066, 1067-78 (1962)(leadpersons not supervisors when they assign operators to particular machines); *Clark Machine Corp.* 308 NLRB 555-56 (1982)(assistant foreman in machine shop assignment of jobs is a function of routine work judgment and not a function of authority to use the type of independent judgment required of a supervisor); *Kent Products*, 289 NLRB 824 (1988)(welding department

leadperson not supervisor when assessed jobs and available personnel and then assigned personnel to machines needed to perform jobs.)

The Board has consistently recognized that “there are highly skilled employees whose primary function is physical participation in the production or operating processes of their employer’s plants, and who incidently direct the movements and operations of less skilled subordinate employees, employees who nevertheless are not supervisors.” *Ten Broeck Commons*, 320 NLRB at 809-10, quoting *Southern*, 151 NLRB at 791. The Board has held that “assignment and direction . . . typical of leadperson positions . . . are not supervisory in providing direction and guidance to other employees involved in a project based on . . . experience and craft skill is not supervisory.” *SDI Operating Partners*, 321 NLRB at 111 (1996). *See, also, KGW-TV*, 329 NLRB 378, 383 (1999)(such directions simply are incidental to the employee’s ability to perform their own work); *Koons Ford*, 282 NLRB 506, 513 (1986), *enf.*, 833 F.2d 310 (4th Cir. 1987)(directions issued by “skilled workers” to “helpers and apprentices” does not make the skilled worker a supervisor). *See, also, Arlington Electric*, 332 NLRB No. 74 (2000). The direction of work that is routine in nature and typical of a leadperson is not sufficient to make a finding of a supervisory status. *Buyers Engineering Corp.*, 326 NLRB No. 125 (1997); *Consolidated Services*, 321 NLRB 845 (1996); and *Azusa Ranch Market*, 321 NLRB 811 (1996).

Leadpersons do not assign employees to work areas. (Tr. 142-43). Leadpersons must check with a supervisor before letting anyone go home. (Tr. 50). Leadpersons cannot give employees time off. (Tr. 228). Leadpersons cannot send an employee home without

permission from a supervisor. (Tr. 42, 108, 144, 197, 228 and 326). Although the Employer did present some evidence that some leadpersons keep time sheets, not all lead people do keep such records. (Tr. 108 and 329). Moreover, there is at least one agreed upon bargaining unit employee that keeps such records. (Tr. 333).

Leadpersons are not involved in the hiring process. (Tr. 29 and 69). Leadpersons do not interview prospective employees. (Tr. 110, 142 and 224). Leadpersons do not have the authority to hire and fire employees. (Tr. 111, 144, 191 and 196).

If someone does not follow a leadperson's directions, he or she must go to a supervisor or personnel to get the matter resolved. (Tr. 48 and 245). Leadpersons do not normally sign disciplinary warnings. (Tr. 43-44). Leadpersons have no authority to discipline employees. (Tr. 112-13, 135, 144, 192, 196 and 225). The Board has long held that a reporting function with respect to disciplinary matters, pursuant to which employees notify management about problems, is insufficient to confer supervisory status. See, *Heritage Hall, EPI Corp.*, 333 NLRB No. 63, *sl. op.* p. 3 (2001). Likewise, the Board has long held that just because an employee gives another employee an oral counseling does not confer supervisory status on the employee delivering the counseling. *Ten Broeck Commons*, 320 NLRB 806, 812 (1996); *Northern Montana Healthcare Center*, 324 NLRB 752 (1997).

Leadpersons are not authorized to lay off or recall employees. (Tr. 112-13, 144, and 322). Leadpersons do not handle grievances for the company. (Tr. 113 and 145). Leadpersons do not promote or transfer employees. (Tr. 144, 196-98, 205, 229 and 322).

In addition, secondary indicia demonstrate leadpersons are not supervisors. The Employer holds supervisory meetings every morning and the leadpersons normally do not attend these meetings. (Tr. 82-247). Supervisors receive different benefits from hourly employees. (Tr. 75 and 324). Leadpersons receive the same benefits as hourly employees. (Tr. 227, 252 and 324). Supervisors do not punch a clock. (Tr. 324). Leadpersons are hourly and must clock in. (Tr. 27 and 75). Leadpersons are provided with the same employee orientation as hourly employees. (Tr. 27). Leadpersons do not counsel other employees. (Tr. 42).

In short, leadpersons possess none of the traditional indicia set forth in the statute designating them as supervisors.

II. Specialty Leadpersons Are Not Supervisors Within The Meaning Of The Act.

All of the arguments applicable to the leadpersons set forth above are also applicable to the specialty leadpersons. The Employer argues that the specialty leadpersons is paid 46% more per hour than the highest paid production employee. However, the Employer does not compare the specialty leadpersons wage rate with that of the maintenance employees with whom the specialty leadpersons works. Absent evidence to the contrary, we must assume those wage rates are similar. The only special training the specialty leadpersons receives relates to the production aspects of the maintenance job not to supervisory aspects. (Tr. 20-21). Although the Employer claims the specialty leadpersons has the right to discipline employees, they were able to testify to no examples of such disciplinary action. (Tr. 23).

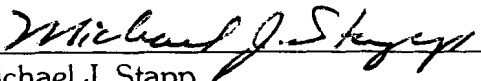
Absent evidence that the specialty leadpersons has exercised some of the specific indicia of a supervisory status, the Employer has not met its burden of proof of demonstrating specialty leadpersons are supervisors.

III. The Load Supervisors Are Not Supervisors Within The Meaning Of The Act.

The only load supervisor to testify was James Martin. Mr. Martin testified that he loads trucks. (Tr. 256-57). Martin is not involved in interviews or hiring of employees. (Tr. 260). The load supervisor is not involved in the transfer of employees. (Tr. 260). Load supervisors do not discipline employees. (Tr. 261). The load supervisors do not schedule employees. (Tr. 261). To the extent load supervisors direct other employees' work that direction of work is routine in nature. (Tr. 261-62 and 267-68). Warehouse leadmen who spend a portion of their day telling employees which trucks to unload are not supervisors. *Highland Superstores v. NLRB*, 927 F.2d 918, 921 (6th Cir. 1991). A supervisor is always present when the load supervisors are working to directly supervise employees. (Tr. 262). The load supervisors do not attend supervisory meetings. (Tr. 262). The load supervisors clock in just like all hourly employees. (Tr. 262). The load supervisors work all day loading trucks. (Tr. 262-63). The load supervisors are not allowed to grant overtime. (Tr. 264). Once again, the Employer has failed to meet its burden of proving that the load supervisor possess any of the traditional indicia of supervisory status as set forth in the statute.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that the Board affirm the Regional Director's Decision and direct these ballots be opened.


Michael J. Stapp
BLAKE & UHLIG, P.A.
753 State Ave., Suite 475
Kansas City, KS 66101
Ph: (913-321-8884)
Fax: (913) 321-2396


ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Brief was served upon the following by United States Mail, postage pre-paid, this 18th day of November, 2002:

Norman A. Mott, III, Esq.
Shields Mott Lund L.L.P.
650 Poydras Street, Suite 2400
New Orleans, Louisiana 70130

Mr. James Paulsen
Acting Regional Director
National Labor Relations Board
Region 15
1515 Poydras Street, Room 610
New Orleans, Louisiana 70112-3723


Karen K. Wells